Supreme Court, U. S.
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THE

Supreme Court of the United States

October Term, 1977

No. 77-1145

RAY A. MELENDY,

Petitioner,

vs.

UNITED STATES POSTAL SERVICE AND NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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UNITED STATES POSTAL SERVICE AND NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully urges that a writ of certiorari be issued to the United States Court of Appeals for the Seventh Circuit to review and reverse the judgment of that court in the above entitled cause on January 10, 1978.

OPINIONS BELOW

None of the opinions and orders rendered below have been reported. The memorandum opinion of the United States District Court for the Northern District of Illinois, dated December 13, 1976, is set out as Appendix A hereto. On January 13, 1977, the court vacated the aforesaid order sua sponte and directed the submission of memoranda on the issue whether defendant United States Postal Service could be held liable for breach of contract absent a finding that defendant National Association of Letter Carriers had breached its duty of fair representation. The order of the district court, dated February 10, 1977, granting summary judgment to the Postal Service is set out as Appendix B. The unpublished order of the United States Circuit Court of Appeals for the Seventh Circuit, dated January 10, 1978, is set out as Appendix C.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. sec.1254 (1). Federal

jurisdiction of this controversy rests upon the Postal Reorganization Act of 1970, 39 U.S.C. sec. 1208-b, and the Labor Management Relations Act, 29 U.S.C. sec. 141 et sequentia.

QUESTIONS PRESENTED

1. Is an employer exonerated from liability for breach of a collective bargaining agreement when there is a determination that the labor union-party to the agreement has not breached its duty of fair representation in processing a grievance against the employer, notwithstanding the trial court's express finding that a triable issue of fact exists as to whether the employer's disciplinary suspensions of the grievant were wrongful?

2. Is it "arbitrary," "discriminatory," or "bad faith" conduct for a labor union, acting through its national business agent, to refuse to process a grievance to arbitration notwithstanding the agent's admitted practice of pressing to arbitration upon a grievant's request for full exoneration and a grievant's demand that he do so?

3. Is summary judgment under Fed. R. Civ. Proc. 56 inappropriate when issues of motive, intent and other subjective feelings and reactions are at the core of disputed factual interpretations?

STATEMENT OF THE CASE

This controversy arises out of a triparite controversy between petitioner, his employer, and the labor organization to which he belongs. As Professor Cox once noted, "(t)he law has always had trouble with triparite relationships; and in the labor field there are additional complications." Cox, Rights Under a Labor Agreement, 69 Harvard L. Rev. 601, 604 (1956). The major complication herein was engendered by this court's divided opinion in Vaca v. Sipes, 386 U.S. 171, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967). A brief explication of the facts will make apparent the drastic over-reach of the purported "holding" of Vaca.

Petitioner Melendy's primary dispute is with his employer, the United States Postal Service (hereinafter "USPS"). Melendy was first employed

by USPS on June 1, 1968. On April 8, 1970 he became a full-time regular mail carrier at the Park Ridge, Illinois postal facility. In December, 1970 the difficulties which gave rise to this action began. Melendy was involved in an argumant with the postmaster of his facility, John R. Simpson, over Melendy's addressing of Christmas cards in the postal facility after clocking out for the day. The dispute was not resolved and Melendy alleges that he thereafter became the special object of management harassment.

This allegation was borne out when Melendy was subjected to three substantial disciplinary suspensions between June, 1974 and January, 1975. Each suspension was imposed without any resort to problem counselling, as required by the collective bargaining agreement, or use of some less drastic disciplinary measure. They were thus far more punitive in nature than corrective. Melendy affirmatively alleges that the suspensions were part of a calculated effort to "get rid of Melendy," and that the aforementioned postmaster and supervisor William

Knaak had so stated to Melendy himself, and to other employees of the Park Ridge facility. Melendy verified this fact before the district court with his own affidavit, and the statements of his fellow workers.

The events for which the suspensions were issued testify to the disproportionate severity of the sanctions. Melendy received a fifteen day suspension on June 5, 1974 arising out of an altercation with a postal customer named Kalberg. The incident stemmed from Melendy's refusal to enter Kalberg's property while Kalberg's German sheperd dog was at large. On July 25, 1974 Melendy was given a twenty-one day suspension for a similar incident again involving Kalberg, and for a separate complaint from another postal customer involving Melendy's refusal to place mail in an improperly located mailbox. The third suspension came on December 7, 1974 and was for twenty-nine days. The asserted basis for this measure was Melendy's alleged failure to properly deliver or notify of postage due mail for Klaberg and Kalberg's next door nieghbor--again

because of the presence of Kalberg's dog at the time of attempted delivery--and also because of "elements of your past record." As Petitioner stated in his affidavit filed in the district court:

> "All insignificant and routine occurrences on a route were blown up out of proportion by management through William F. Knaak and Postmaster Simpson. In their efforts to cause my termination, they urged people to write in complaints, never seeking my version of the incident, never trying to resolve a problem that existed with a postal customer. Instead they encouraged the complaints acting as a catalyst, causing and furthering customer irritation." (Affidavit of R.A. Melendy, p. 8, para. 14.)

Melendy was, of course, obligated to at least attempt to employ the available grievance-arbitration machinery in seeking protection from alleged management harassment. Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965). From the outset, however, he was met only with further difficulty. The facts surrounding the National Association of Letter Carriers, AFL-CIO (hereinafter "NALC"), treatment of Petitioner's grievances may be summarized as follows.

Melendy's first grievance, against the fifteen

day suspension, was taken all the way to arbitration. He was not, however, represented at the crucial stage of the proceeding by NALC. After a pre-arbitration (step "2B") meeting in which Melendy, NALC National Business Agent Henry Zych and postal Service representative Edward Keonjian held a discussion over Melendy's grievance, Melendy secured private legal counsel to represent him in the arbitration proceeding. Melendy was displeased and vocal about Zych's efforts to resolve the grievance and Zych did little to assist Melendy with the preparation of his grievance for the arbitrator. As Melendy stated to the district court:

> "Henry Zych, the Union representative and national business agent, refused to confer with me concerning this case, refused to tell me which disciplinary suspension was being arbitrated, and refused to assist me with providing the very basic information so that I could notify my witnesses to be present to testify. I telephoned Henry Zych on April 7, April 8, and April 9, 1975, in order to get the information so that I could contact my witnesses but he refused to talk to me . . . " (Affidavit of R.A. Melendy, p. 4, para. 10.)

Melendy was, however, successful in convincing

the arbitrator that his actions which were the subject of the initial suspension were justified. As the arbitrator noted in his written decision,

> "(T)he overall conduct of the grievant, while far from commendable, was reasonable under the circumstances. There was a history, with him and others, that the dog and its' owner might expect an altercation. There was an uncontradicted recital of his attempt to avoid trouble, before it occurred. There was so;id evidence of his withdrawal, after the trouble did occur, only to have the confrontation reengendered by the complainant.
>
> "This grievant was apparently both grossly and improperly provoked, over some considerable time, and the quality and quantity of his response in such circumstances is not susceptible of minute evaluation by afterthought." (Opinion of Arbitrator William Belshaw, dated April 11, 1975, pp. 1-2.)

Despite the fact that Melendy sought to achieve such exoneration from all the disciplinary measures, the second two grievances were not allowed to progress beyong the step 2B stage. Administration of grievances at and beyond the step 2B proceedings was the sole prerogative of the union, at least in theory. Henry Zych testified during discovery in the instant case that it was his practice to allow grievances to progress beyond step 2B if the grievant

and the local union branch so desired. Zych's deposition testimony was as follows:

> "(W)henever a branch calls me and says John Doe wants nothing but complete exoneration, that would be my position . . . and I would go--"I'm not going to accept any settlement or withdrawal or reduction in lieu of this; you're going to get complete exoneration." If management said "we're not going to consider what you're asking for," I would say "(W)ell then, you know what your answer is, you send me the decision" and he would send me a denial and then I would send the branch letting them know . . . "here's the denial, now, you have the opportunity to go to arbitration."

This important practical limitation on the exclusive power of the union to cut short the full grievance procedure was not, however, made available to Melendy when he sought to press his two remaining grievances to arbitration. Instead, Zych settled the second (twenty-one day) suspension for ten calendar days suspension on October 15, 1974. Zych also settled the third grievance on August 11, 1975--after Melendy's successful appeal to the arbitrator--for a reduction from twenty-nine to fifteen days. Melendy was thereby deprived of his chance to overturn all the charges made against

him, and to thwart what was believed to be a management campaign to for his removal. This suit against both the employer and the union shortly follwed on October 17, 1975.

In the district court both defendants moved for summary judgment. The district court ruled adversely to plaintiff in granting judgment to the union, but agreed with Melendy that a triable issue of material fact existed as to the conduct of the employer:

> "(P)laintiff's assertions that Supervisor Knaak stated to him on numerous occasions that "Melendy, before I retire I am going to get rid of you" and that Melendy was incompetent, stupid and lazy are sufficient to raise the issue of whether plaintiff's suspension was wrongful. See Conrad v. Delta Airlines, Inc., 494 F.2d 914, 918 (7th Cir. 1974). Plaintiff also has ' controverted the statements of the customers concerning the incidents for which the suspensions were imposed. Therefore, summary judgment for the employer is inappropriate and is denied."

App. A, p. A4, infra.

This holding, obviously rendered without reference to the language of this Court in Vaca, supra, was later vacated and summary judgment

granted to both defendants. See App. B, page A5, infra. The Court of Appeals affirmed on the grounds that under the applicable fair representation standards Melendy had failed to make out a showing of union bad faith or discrimination, and that Vaca was dispositive of all questions relating to the separate liability of the employer.

REASONS FOR GRANTING THE WRIT

I. THE JUDGMENTS BELOW WOULD ENTIRELY SUBJECT UNION MEMBERS' INDIVIDUAL RIGHTS UNDER COLLECTIVE BARGAINING AGREEMENTS TO THE UNION'S POWER TO CONTROL GRIEVANCES AGAINST THE EMPLOYER. THIS PUTS AN INTOLERABLE BURDEN ON THE INDIVIDUAL'S RIGHT TO SUE FOR BREACH OF THE COLLECTIVE BARGAINING AGREEMENT UNDER SECTION 301 OF THE L.M.R.A.

Almost 35 years ago Mr. Justice Jackson, dissenting in Wallace Corp. v. NLRB, 323 U.S. 248 (1944), recorded this pertinent observation:

> "The labor movement in the United States is passing into a new phase. The struggle of the unions for recognition and rights to bargain and of workmen for the right to join without interference seems to be culminating in a victory for labor forces. We appear to be entering the phase of struggle to reconcile the rights of individuals and minorities with the power of those who control the collective bargaining groups."

Id., at 271.

There is perhaps no area where this necessity for reconciliation is more apparent than that in which this case falls. But under the literal interpretation of Vaca v. Sipes adopted here, Petitioner's interest in and right to a direct contractual remedy against defendant USPS is made utterly dependant upon the separate and distinct question whether the NALC gave him fair representation. The latter inquiry is in itself aN inexact and uncertain test. The practical result of this for individuals in Melendy's position is that the situation envisioned by Mr. Justice Black in Vaca, 386 U.S. at 210, comes to pass.

> "Henceforth, in almost every sec. 301 breach-of-contract suit by an employee against an employer, the employee will have the additional burden of proving that the union acted arbitrarily or in bad faith. The court never explains what is meant by this vague phrase or how trial judges are intelligently to translate it to a jury. . . . However these questions are answered, todays decision, requiring the individual employee to take on both the employer and the union in every suit against the employer and to prove not only that the employer breached its contract, but that the union acted arbitrarily, converts what would otherwise be a simple breach-of-contract action into a three-ring donnybrook. It puts an intolerable

> burden on employees with meritorious grievances and means they will be frequently left without a remedy. Today's decision, while giving the employee an ephemeral right to sue his union for breach of its duty of fair representattion, creates insuperable obstacles to block his far more valuable right to sue his employer for breach of the collective bargaining agreement."

Petitioner therefore respectfully urges that the doctrine of Vaca v. Sipes is too vague and overbroad a means for dealing with all employee-union-employer disputes. Particularly in a situation such as the present one, in which the union has been initially found to have discharged its fair representation duty but the employer found to still have acted in bad faith, applying the rationale of Vaca uncritically leaves the employee without a remedy. Yet this is precisely the "approach" the courts below employed. The rule Vaca was asserted to propound was taken as a fixed and immutable principle.

In light of these facts, this Court should grant certiorari to determine whether in any and all circumstances union misconduct is a prerequisite

to a suit against an employer for separate and distinct misconduct. Absent a definitive determination by this Court, union litigants are foreclosed from direct redress against employers in a wide range of circumstances indeed.

In addition, the Court in Vaca properly read what little authority it had to furnish employees a "last resort" in the event of failure of contract grievance procedures:

> ". . .(I)t is settled that the employee must at least attempt to exhaust exclusive arbitration and grievance proeedures established by the bargaining agreement. However, because these contractual remedies have been devised by the union and the employer, they may well prove unsatisfactory or unworkable for the individual grievant."

Id., at 184-185. Emphasis supplied.

The Court went on to hold that union misrepresentation was one of the ways the process could go wrong. While it failed to state explicitly that the same argument applies to the possibility of employer misconduct the exclusion of this possibility leaves open the possibility that, as here, a breach of the collective bargaining agreement would go unremedied. Of course, the opinion in Vaca was

an inadequate vehicle to discuss all facets of the problems raised therein because the issue of employer liability was not in the facts before the Court. Id., at 199-200 (Fortas, J., concurring). The problems of accomodating the Vaca analysis to employer misconduct is squarely presented here, however, and the Court should review the judgment of the courts below to clarify an importantand largely untested area of federal labor law.

II. THE UNION'S REFUSAL TO PROCESS PETITIONER'S SECOND AND THIRD GRIEVANCES TO ARBITRATION DESPITE HIS DEMAND THAT THEY BE ARBITRATED WAS "ARBITRARY," "DISCRIMINATORY," OR "BAD FAITH" CONDUCT IN LIGHT OF THE UNIONS' ACKNOWLEDGED POLICY OF HONORING SUCH REQUESTS.

Notwithstanding this court's determination of the merits of Petitioner's arguments of the proper application of Vaca v. Sipes, there are two other, more narrow bases for reversing the judgment granted below. The first is that the Court of Appeals erroneosly interpreted or misread the record in finding that defendant NALC did not breach its duty of fair representation. The source of this express

error is the Court of Appeals finding that

> " "The record does show that Zych had a policy of not settling disciplinary grievances when the employee or union or both demanded full exoneration of the employee. However, Melendy offered no proof that Zych knew that either Melendy or the local union demanded full exoneration. Any such demand was stated in letters to people other than Zych, dated after the settlements in question."

App. C, pp. A16-17.

This assertion, which the Court of Appeals employed to sidestep one of Melendy's strongest factual bases for claiming a breach of the duty of fair represetation, is belied by the record. At least two such letters, directed to Zych before the dates of the settlements in question, demanded that Melendy be made whole.

On July 11, 1974, union steward Coyle Stein wrote to Zych concerning Melendy's initial 15 day suspension and stated:

> "If these Grievances (sic) do not merit complete clearence of the Grievant . . . I feel the entire work done will be wasted."

See attachment #1, copy of the above.

Similarly, in a letter dated June 18, 1974

from Coyle Stein to Zych discussing supervisor William Knaack's threats to "have two or three mail carriers fired." Stein stated:

> "I feel that this, if no other grievance, should be fully fought right up the line and to a successful conclusion. We do not need or want Management Personnel who make threats, and will go to devious means to harass, and even perhaps, try to unfairly trap working carriers."

See attachment #2, copy of the above.

These letters are perhaps subject to differing interpretations in light of their primary reference to the first grievance, which was arbitrated. Nonetheless, taken in conjunction with Melendy's answers to defendant USPS's interrogatories 13 a-d specifying the local union representatives who were appraised of Melendy's demand (including Zych), they raise a substantial' question as to whether and why Zych did not press Melendy's second and third claims to arbitration. See attachment #3, copies of answers to interrogatories, and attachment #4, the letter to which the Court of Appeals referred.

III. SUMMARY JUDGMENT WAS INAPPROPRIATE IN THIS CASE OWING TO THE IRRESOLVABLE QUESTIONS OF CREDIBILITY INHERENT IN THE FACTS

In Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970), Justice Black, concurring, stated:

> "The advantages of trial before a live jury with live witnesses, and all the possibilities of considering the human factors, should not be eliminated by substituting trial by affidavit and the sterile bareness of summary judgment.

Id., at 176. Despite the fact that the present case is one in which the human factors are at the center of the controversy, judgment was originally entered for both defendants solely on the basis of written submissions to the court. This was not the case in the district court's first opinion which recognized the critical issues of credibility going to the truth of the complaints and allegations against Petitioner. Precisely why the district court saw fit to recognize the issues present in the case of the USPS, but not defendant NALC, is not apparent from the record. To the contrary, it is clear from the record that Melendy's version of events directly controverted all the documents and testimony

relied upon by defendants. It is axiomatic under the decisions of the federal courts that such factual conflicts are to be resolved by the jury and not by summary judgment. 6 Moore's Federal Practice, sec. 56.15 (4) at p. 56-519, Carroll Electric Co-Op v. Eisbach, 440 F.2d 1171 (7th Cir. 1971)

Especially relevant in this regard is Melendy's assertion that Zych was indeed aware that he wanted complete exoneration, and that Zych did not comport with these wishes.

Moreover, Melendy's affidavit submitted to the district court controverted nearly all the allegations levelled at him by complaining postal customers. In light of this fact, summary judgment should have been denied to both defendants, and this court should summarily reverse the judgment of the lower courts to the contrary.

CONCLUSION

For all the foregoing reasons, the order of the Circuit Court of Appeals should be reversed.

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APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
Eastern Division

RAY MELENDY, Plaintiff,	)	
-vs-	)	NO. 75 C 3499
UNITED STATES POSTAL SERVICE, et al., Defendants.	)	

MEMORANDUM OPINION

JOHN F. GRADY, District Judge: Both defendants have moved for summary judgment in this action. We will grant the defendant union's motion, but deny the employer's motion.

The Union

The plaintiff has alleged that the union breached its duty of fair representation in processing his three grievances against his employer. Vaca v. Sipes, 386 U.S. 171 (1967), states the

controlling rule of law:

> A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.

Id. at 190. The Court of Appeals for the Seventh Circuit has elaborated further on this standard:

> To prove arbitrary or discriminatory treatment, the plaintiff must show that the Union's conduct was intentional, invidious and directed at that particular employee.

Cannon v. Consolidated Frieghtways Corp., 524 F.2d (7th Cir. 1975). After careful review of the pleadings and the affidavits, we have decided that no genuine issue exists over whether the union breached its duty of fair representation.

The union's business agent avers that in connection with the first grievance he attended two "Step 2B" meetings and accepted a settlement reducing the suspension. In his affidavit, the plaintiff claims that the business agent refused to confer with him and assist him in presenting his first grievance. We believe that the union's decision to request arbitration, notwithstanding

the agent's recommendation, rendered harmless any breach the agent possibly committed in processing the first grievance.

With respect to the second and third grievance (sic), the union presented in its affidavits the procedure followed in processing the grievances and the reasons given for not requesting arbitration. Plaintiff attempts to raise a bad faith issue by averring that the agent told him on numerous occasions that "carriers who cause trouble lose their jobs" and advised him not to picket the Postal Service "if you want your job." Even interpreting the plaintiff's averments in a light most favorable to him, we cannot say that the plaintiff has successfully raised the issue of bad faith or arbitrary treatment. Therefore, we grant the union's motion for summary judgment.

The Employer

In his action against his employer for wrongful suspension, the plaintiff alleges that the real reason for his suspension was a personal vendetta on the part of his supervisor. The employer presented

affidavits supporting the customers' complaints which, it alleges, caused the suspension. We agree with the employer that most of the material presented by the plaintiff in his affidavit would be inadmissible as evidence and thus cannot be considered on a motion foe summary judgment. However, plaintiff's assertions that Supervisor Knaack stated to him on numerous occasions that "Melendy, before I retire I am going to get rid of you" and that Melendy was incompetent, stupid and lazy are sufficient to raise the issue of whether plaintiff's suspension was wrongful. See Conrad v. Delta Airlines, Inc., 494 F.2d 914, 918 (7th Cir. 1974). Plaintiff has also controverted the statements of the customers concerning the incidents for which the suspensions were imposed. Therefore, summary judgment for the employer is inappropriate and its motion is denied.

The motion of National Association of Letter Carriers, AFL-CIO, for summary judgment is granted. The motion of United States Postal Service for summary judgment is denied.

DATED: December 13, 1976

ENTER: John F. Grady

United States District Judge

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
Eastern Division

RAY MELENDY, Plaintiff,	)	
-vs-	)	NO. 75 C 3499
UNITED STATES POSTAL SERVICE, et al., Defendants.	)	

ORDER

Defendant-employer United States Postal Service has moved to dismiss for lack of subject matter jurisdiction. Its motion is granted. Because we

granted summary judgment to the Union, National Association of Letter Carriers, this court erred in denying summary judgment to the United States Postal Service. Breach of the duty of fair representation by the Union is a jurisdictional prerequisite to maintaining a suit against an employer under 29 U.S.C. sec. 185(a). See Hines v. Anchor Motor Frieght, 424 U.S. 554 (1976) and Barbarino v. Anchor Motor Frieght, 421 F. Supp. 1003 (W.D.N.Y. 1976).

With this order, judgment for the Union becomes final and the time to appeal runs from this date. Therefore, plaintiff's motion to extend time to file notice of appeal is premature and is denied.

DATED: February 10, 1977

ENTER: John F. Grady

United States District Judge

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

RAY MELENDY, Plaintiff-Appellant,	)	
No. 77-1381 -vs-	)	75 C 3499
UNITED STATES POSTAL SERVICE and NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, Defendants-Appellees.	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. John F. Grady, Judge.

Argued: September 28, 1977

Decided: January 10, 1978

Before Cummings, Sprecher and Wood, Circuit Judges.

ORDER

Ray Melendy appeals from an order and judgment of the district court which granted the motions for summary judgment of the United States Postal Service (USPS) and the National Association of Letter Carriers, AFL-CIO (NALC). This action was commenced by Melendy, a letter carrier and a union member,

against NALC and USPS pursuant to 39 U.S.C. sec. 1208(b). He sought money damages from both parties. He claimed that USPS had brached the collective bargaining agreement when it disciplined him. He also claimed that NALC had not provided fair representation of his challenges to the discipline in the grievance procedure.

Both NALC and USPS moved for summary judgment. The district court, in an unpublished memorandum decision dated December 13, 1976, granted the motion of the NALC on the fair representation claim, but denied the motion of USPS. On January 13, 1977, the district court, sua sponte, vacated its order denying summary judgment to USPS, and directed the submission of briefs on whether the employer could be found liable for breach of the collective bargaining agreement if the union had grieved the disciplinary action and had not breached its duty of fair representation during the grievance process. Thereafter, based upon Hines v. Anchor Motor Frieght, Inc., 424 U.S. 554 (1976), and Barbarino v. Anchor Motor Frieght, Inc., 421 F. Supp. 1003 (W.D.N.Y.

1976), the district court also granted summary judgment to USPS.

Melendy contends on appeal that the district court erred when it granted the NALC's motion for summary judgment because there existed genuine issues of material fact, precluding summary judgment as a matter of law. Melendy further contends that the district court erred when it granted USPS's motion for summary judgment because the district court held that a suit for breach of a collective bargaining agreement could not be maintained if the union provided fair representation in grieving the breach.

The facts involved in this case are as follows:

Melendy was suspended from work three times by management between June, 1974 and January, 1975. He claims these disciplinary suspensions were imposed to force him to resign and were the result of a personality conflict between himself and supervisory staff at the post office to which he was assigned.

The first suspension, for 15 days, resulted from a complaint that Melendy had used foul and

abusive language toward a postal customer while discussing attacks by the customer's dog. This suspension was grieved through the procedure established by the collective bargaining agreement.

While the first grievance was still in its early stages, Melendy received a second suspension for 21 days. This suspension resulted from a complaint by the same customer that Melendy was not delivering mail, and a complaint from a different customer that Melendy was rude. Melendy denied the charges and asserted that the first customer had a continuing vendetta against him.

This suspension was also grieved. At the step 2B grievance meeting of the union and management, the grievance was settled. The suspension was reduced to 10 days. At approximately the same time, the first grievance was denied at the step 2B stage.

After the second grievance had been settled, but before the first grievance had been arbitrated, Melendy received a third suspension for 29 days. This suspension resulted from another complaint from the

customer with the dog and another customer both asserting that Melendy had failed to attempt delivery of postage due mail. Melendy admitted not attempting delivery of the postage due mail to the house with the dog, but asserted the dog prevented the attempt. Melendy denied not attempting delivery of the postage due mail to the nieghbor's house.

At the step 2B grievance meeting, this grievance was also settled, the suspension being reduced to 15 days. This settlement was reached after the a arbitrator had resolved the first grievance proceeding in Melendy's favor.[1/]

A.

We wil first consider the propriety of granting

1/ The arbitrator found that Melendy had been improperly suspended the first time and ordered that Melendy be returned to as good a status as he would have occupied had the suspension not occurred. Melendy's pleadings do not assert a claim as to the first grievance. Melendy, however, repeatedly relies upon the favorable arbitration award as proof that the union did not provide fair representation and that the employer was not warranted in imposing discipline. Other than the fact that the arbitration award occurred, the first suspension is not relevant.

summary judgment to the union, since to reverse as to the NALC would require reconsideration of the granting of summary judgment as to USPS under Hines v. Anchor Motor Freight, Inc., supra. Melendy asserts that the union breached its duty of fair representation by acting arbitrarily and in bad faith. He asserts there were four areas in which genuine issues of material fact were unresolved concerning the suspensions. They were: 1) the hostility towards Melendy of the union representative; 2) the union's bad faith, dishonest treatment of the grievances; 3) the refusal to press the second and third grievances to arbitration; and 4) the lack of preparation by the union representative in presenting the grievances.

Our resolution of whether summary judgment was properly granted to the NALC is controlled by FED. R. CIV. P. 56(e),[2/] and our decision in Cannon v.

2/ Rule 56(e) provides in pertinent part:

> When a motion for summary judgment is made and supported as provided in this

(Footnote continued on next page)

Consolidated Freightways Corp., 524 F.2d 290 (7th Cir. 1975), where we set forth the standard to determine if a union's conduct toward its member was arbitrary of discriminatory:

> (T)he plaintiff must show that the union's conduct was intentional, invidious, and directed at that particular employee.

We must also be mindful of the policy preferring resolution of labor disputes through the grievance process. This is particularly true, where, as here, the grievance procedure was an obviously bargained for provision in the collective bargaining agreement.

In the agreement, both the union and the employer agreed that disciplinary matters would be processed through a grievance procedure. The collective bargaining agreement in this particular case places control of the grievance in the union

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2/ Continued
rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if apprpriate, shall be entered against him.

once it leaves the local work level, not in the employee. It is the union that continues the grievance, but only when in its judgment further processing is in the common good. The union in the agreement here in question was properly in control of the handling of Melendy's grievances at the step 2B grievance meetings.

We turn therefore to Melendy's assertions that there are genuine issues of material fact in this record that precluded the district court from finding fair representation by the union.

The affidavit of Henry Zych, the union representative at the step 2B grievance meetings, set forth at length the proceedings at the step 2B meetings on Melendy's grievances, including when possible a recollection of the arguments advanced on behalf of Melendy. As to both the second and third grievances, Zych stated that the settlements in both were based solely upon his assessments of the merits of the grievance, including review of the statements of the complaining postal customers and his conversations with Melendy concerning the

grievances. Melendy did not offer any proof that contradicted Zych's affidavit that the settlements were based solely upon Zych's assessments of the merits of the grievances.

Melendy offered no proof from which a valid inference might arise that Zych was "personally hostile" toward him.[3/] Melendy offered no proof that Zych refused to cooperate with him on the second or third grievances.[4/] Indeed, Melendy does not dispute Zych's statement that he had conversations with Melendy concerning the merits of the grievances. Melendy's attempt to undercut the force of Zych's affidavit by asserting that Zych was not adequately prepared for the grievance meetings is unsupported in the record.

3/ Melendy attempted to create an inference that Zych showed "personal hostility (or lack of respect) toward Melendy," by Zych's statements in his deposition that he recalled Melendy used an unflattering term in referring to a judge whom Melendy felt he should sue, that Zych thought Melendy had "a little vindictive attitude," that Zych stated "I can tell you a number of vendettas he (Melendy) told me about," and that Zych testified to being told by the local union president that Melendy was "a real hothead." These statements simply fail to put into controversy Zych's uncontradicted statement that the settlements were based solely on his assessments of the merits.

4/ Melendy offered proof that Zych was less than cooperative in arbitrating the first grievance. The arbitration award was resolved favorably to Melendy, and thus no claim is maintainable on that charge. Moreover, Melendy never offered proof that would indicate that Zych's unenthusiastic treatment of the first grievance "spilled over" into Zych's handling of the second and third grievance.

Melendy's assertion that failure by the union to take his latter grievances to arbitration is proof of the union's arbitrariness, bad faith and dishonest treatment is equally unfounded, but for a different reason. The union need not arbitrate every grievance. Vaca v. Sipes, 386 U.S. 171, 191-192 (1967). The union has a duty to screen grievances and arbitrate only those the union believes are meritorious. Cf. Moore v. Sunbeam Corporation, 459 F.2d 811, 819 (7th Cir. 1972).

The record does show that Zych had a policy of not settling disciplinary grievances when the employee or the union or both demanded full exoneration of the employee. However, Melendy offered no proof that Zych knew that either Melendy or the local union demanded full exoneration. Any such demand was stated in

letters to people other than Zych, dated after the settlements in question.

Lastly, but most tellingly, Melendy acknowledges that "(b)y themselves the settlements were not arbitrary, and may have plausibly been founded upon the merits of the grievances."[5/] This acknowledgment 1) supports Zych's affidavit that he settled the grievances in good faith on their merits, and 2) establishes that "just cause" was arguably present for assessing discipline.

The lowest common denominator in Melendy's claims is that he believes he could have done better in arbitration and that the union cannot dep ive him of his "roll-of-the-dice" because that would be a denial of fair representation. As was noted before, the union had no obligation to arbitrate grievances that it believed were non-meritorious. Vaca v. Sipes, supra. Settlement was a reasonable alternative, particularly in light of the fact that the union did

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5/ This candid acknowledgment obviates any need for this court to hold that the settlements were not arbitrary and were based on the merits of the grievances.

achieve a reduction of the suspensions. Summary judgment was therefore properly granted on the mo motion of the NALC.

B.

Having affirmed the grant of summary judgment to the NALC, we must consider whether Melendy has a claim for breach of the collective bargaining agreement against the employer, USPS, arising from the disciplinary suspensions.

In Vaca v. Sipes, 386 U.S. at 186, the Supreme Court held that an action against the employer for breach of the collective bargaining agreement can be brought "provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance."[6/] See also Hines v. Anchor Motor Freight,

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6/ Melendy contends this holding of the Supreme Court of the United States was only dicta.and that these courts that have relied upon this holding have "misread" and "misapplied" that passage. The holding above quoted, however, was not dicta. The holding was a necessary predicate to resolution of the primary issue of the case, viz., whether state courts had jurisdiction to enforce claims under sec. 301 of the Labor Management Relations Act, 61 Stat. 158 (1947).

supra. In Cannon v. Consolidated Freightways Corp., 524 F.2d at 294-295, and in Moore v. Sunbeam Corporation, 459 F.2d at 818-819, this court adopted the above quoted holding from Vaca v. Sipes. Vaca, Hines, Cannon and Moore control this case. 7/

Summary judgment was therefore properly granted to USPS. Accordingly, the judgment of the district court is

AFFIRMED.

7/ Melendy's claim against the employer in the lower court raised the question of whether the discipline imposed was done with malice. That issue is not relevant to the claim against USPS. There was a valid exercise of disciplinary prergative, particularly in light of Melendy's acknowledgment that settlement of the grievances was not arbitrary and were arguably supported by the merits.

BEST COPY AVAILABLE

(Exhibit)

BRANCH 2080 U.S. POST OFFICE
PARK RIDGE, ILLINOIS 60068

July 11, 1974

Mr. Henry Zych
N. B. A.
323 S. Franklin St.
Chgo. Ill., 60068

(15) Grievances sended

Brother Henry:

I am typing this letter with the hope that you will fully realize the utter lack of cooperation here with management. I was asked by Bro. Melendy to file a grievance on his Suspension of 15 days, which was without previous counselling, or anything to show it was in the making. As you are aware, Management had previously rigged up a charge of same type in the Postal facility at 333 Busse. When we were fortunate enough to have that revoked, there was an oral statement made by one of the management employees that they were going to get him (Ray Melendy) When I checked into the voluminous file on which the 15 day suspension was based, management deliberately stalled me off with delay, stating that due to the press of business, ect., which in each case was a lie. In the end, to comply with the time limit then in force, I had to skim through what was in the file, (Which Management compelled me to copy in long-hand, refusing us the privilege of useing their photostat copying machine. The net result was that I did not have enough time to check the authenticity of the material in the file. I complied with the National Grievance procedure, Article XV, Step 1 of Section 2. When Supervisor denied Grievance, I appealed in writing to the Postmaster of 233 Busse Highway. When, after waiting the specified time for an oral & written reply, which did not come, I forwarded said Grievance on to your office.

I did file two additional Grievances with Local Management on June 26, 1974: ARTICLE XVII - Section 3, ARTICLE XV - 2A, useing the normal (Mgmt. has violated the entire Natl. Agreement, including etc:. On 7/3 Postmaster Designee J. Wieczorek denied each Grievance. The written denial now is in your hands.

I now look forward to justifiable results being worked out at the Regional Level. You are fully aware of the discourtesy and disregard Management has shown for the National Contract. If these Grievances do not merit complete clearance of the Grievant, and also more than a slap on the wrist of the Postmaster, I feel that the entire work done will be wasted. I feel that nothing less than a written apology by the Postmaster, to the membership of Branch 2080 is in order, in addition to the clearing of Brother Melindy.

I am looking forward to seeing you in Seattle, the Good Lord willing, as well as a lot of good work to be done there. Sincerely,

Coyle G. Stein

(Exhibit B)

823-7732

RECEIVED
JUL 1[illegible]
HENRY S. [illegible]

Coyle G. Stein
Chief Steward 2080
21 Third St.
Park Ridge, Ill., 60068

A120

B-12

BRANCH 2080 U.S. POST OFFICE
PARK RIDGE, ILLINOIS 60068

June 18, 1974

BROTHER ZYCH
323 S. Franklin St.
Chicago, Ill., 60606

Greetings:

The enclosures and this note should be self explanatory. I will endeavor to explain each of them and mark them for identification:

1. GRIEVANCE FILED on May 29, 1974 Violation of Article I, Section 6-A
2. Reply to above Grievance, the time over was permitted through an error on original reply made by his Designee, J. Wieczorek.
3. Letter sent to Postmaster, explaining the reason I granted additional time for his reply.
4. Copy of a letter sent your office advising you of trouble we were having with Asst. Supt. Wm. Knaack.
5. Signed Letter by an employee complaining of unfair treatment, with a photostat or Copy of rejection by Asst. Supt. Wm. Knaack.
6. Signed note by two Letter Carriers attesting to one of the many times Wm. Knaack doing Bargaining Unit work, in a Non-Emergency status.
7. Personally noted violations of Wm. Knaack in a relatively short period of time. These were all witnessed by this correspondent, at the days and times stated. Some of these were used orally to substantiate our above Grievance to Postmaster, 333 Busse Highway.
8. Note dated 4/22 voluntarily given to me by three Members of Branch 2080 attesting to the attitude of Asst. Supt. Wm. Knaack to the Letter Carriers Standards, and a comparison of his of them.

I feel that after typing up the list of the many violations I have, personally witnessed while doing my assigned duties as a Carrier, that any explanation of Management cannot hold water, The many times, some of which I have noted, and the untiring times that this gentleman has deliberately, and after being asked to refrain from doing, Bargain Unit work, show his utter disregard for the National Agreement. He is intelligent, fully aware of the flaunting of the Contract he is doing by doing said Bargaining Unit Work, and has no excuse for it. His personal statement about this is that he is ready to retire anyway, but before he does retire, he is going to have two or three Mail Carriers fired first. With this type of personnel in Management, and in a position where he can exercise his threat, the chances of good working relationship at this facility with management, is impossible.

I feel that this, if no other Grievance, should be fully fought right up the line, and to a successful conclusion. We do not need or want Management Personnel who make threats, and will go to devious means to harass, and even perhaps, try to unfairly trap working carriers. He has unfortunately reached the point where he is a menace to our Brothers, and capable of creating much dissension. Trusting that this will merit as always, your full cooperation, I remain

Sincerely yours
Coyle G. Stein

Coyle G. Stein Chief Steward
Branch 2080

Wish I could do more!

(Exhibit E)

11. Name the "supervisory personnel", referred to in Paragraph 12 of your Complaint, who threatened to force you to resign your position.

ANSWER:

[redacted]

12. As to each supervisor named in answer to Interrogatory No. 11, above, specify the date and place of each threat to force you to resign your position.

ANSWER:

[redacted]

13. Concerning Paragraph 15 of your Complaint:

a) Name the "Numerous local Union representatives" who requested "that said matter be taken to arbitration and that a demand for arbitration be made of these disciplinary suspensions..."
b) As to each union representative named in answer to Interrogatory 13a above, specify to whom his/her requests were addressed.
c) As to each union representative named in answer to Interrogatory No. 13a above, state whether his/her requests were made orally or in writing.
d) As to each union representative named in answer to Interrogatory No. 13a above, specify the dates on which he/she made such requests.

ANSWER:

a) Dave Bentsen, Coyle Stein, Dick Goerne, Mike Lambert
b) David Bentsen
(15) James Rademacher & Carl Carlson and Zych
(21) M. Zych
(29) M. Zych, Alfred K. May and James Rademacher and C. Carlson

Ap 24

Coyle Stein
(15) Henry S. Zych
(21) Henry S. Zych
(29) Henry S. Zych and Edward Keonjian

Mike Lambert
(15) by phone, Zych
(21) by phone, Zych
(29) by phone, Zych

Richard Goerne
(15) Not sure
(21) H. Zych
(29) I don't recall if he was involved

c) **Dave Bentsen**
(15) Rademacher and Carlson, writing; Zych, phone and writing
(21) [redacted]
(29) [redacted]

Coyle Stein
(15) Grievances in writing and phone
(21) Grievances in writing and phone
(29) Grievances in writing and phone

Mike Lambert
(15) by phone
(21) by phone
(29) by phone

Richard Goerne
(15) Not involved
(21) Filed grievances in writing and phone
(29) Not involved

d) **Dave Bentsen**
(15) Nov. 4, 1974, Rademacher and Carlson
(21) Unknown
(29) When grievance reached 2B and again on 8/21/75

Coyle Stein
(15) 6/5/74
(21) 7/29/74
(29) 12/12/74

Michael Lambert
(15) Exact dates unknown
(21) Exact dates unknown
(29) Exact dates unknown

A2.25

BRANCH 2080 U.S. POST OFFICE
PARK RIDGE, ILLINOIS 60068

8/21/1975

Brother Alfred E. May:

This is to request arbitration of Case No. [illegible]. I have inclosed the alleged settlement reached by Henry S. Zych and Edward Keonjian, I cannot as President of Branch 2080 accept this alleged settlement. When this grievance was sent to step 2B I asked that the grievant be made whole. Mr. Zych was well aware of my position on this case. I will try to explain to you the reasons that I feel the grievant must be made whole.

1. Management waited over 30 days from the date of the alleged wrongdoing to suspend Brother Melendy and the first day of the suspension was also the day Christmas overtime began for the carriers in our office.
2. Management changed the original letter of charges and added new language to try to bolster thier charge.
3. Managements representative at the 2B hearing Mr. Keonjian was in violation of Artical 15 of the National Agreement because he told my Chief Steward when questioned about the timing of Brother Melendys suspention that if he had his way Brother Melendy would be fired! This shows that Managements representative at Step 2B was a person with direct connection with the case.
4. Brother Melendy has recently won an arbitration case in which one of the patrons involved in this case was also involved. The other patron involved was the next door neighbor to the above mentioned patron. This patron(Mr. Kalberg) and our Postmaster at the time of this charge were both very vindictive to Brother Melendy.

These are some of the reasons I feel as strongly as I do and inclosed within are all documents and information pertaining to this case.

Sincerely Yours,
[signature]
David P. Bentsen
President Branch 2080
Park Ridge Ill.

cc: Henry Zych
N.B.A.
323 S. Franklin St.
Chicago Ill. 60606

(Exhibit J) A136

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Supreme Court, U. S.
FILED
MAY 5 1978
MICHAEL RODAK, JR., CLERK

No. 77-1445

In the Supreme Court of the United States

OCTOBER TERM, 1977

RAY MELENDY, PETITIONER

v.

UNITED STATES POSTAL SERVICE AND
NATIONAL ASSOCIATION OF LETTER CARRIERS,
AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1445

RAY MELENDY, PETITIONER

v.

UNITED STATES POSTAL SERVICE AND
NATIONAL ASSOCIATION OF LETTER CARRIERS,
AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

The petition for a writ of certiorari was not timely filed. The judgment of the court of appeals in this civil suit was entered January 10, 1978 (Pet. App. A7). The time for filing a petition for a writ of certiorari was not extended and the 90-day period for filing provided by 28 U.S.C. 2101(c) expired on April 10, 1978. The petition was not filed until April 11, 1978.

The time limit imposed by 28 U.S.C. 2101(c) is jurisdictional. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 417-418. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

MAY 1978.

DOJ-1978-05